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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JALON MARCELLUS CARWELL, Defendant and Appellant.	B169233 (Los Angeles County Super. Ct. No. BA232696)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Deborah J. Chuang, and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Jalon Marcellus Carwell, appeals from the judgment entered following his conviction, by jury trial, for robbery (5 counts), attempted robbery, rape (4 counts), forcible oral copulation, and forgery, with a prior serious felony conviction finding (Pen. Code, §§ 211, 664/211, 261, 289, 484f, 667, subd. (a)-(i)).[1] Sentenced to state prison for 91 years and 8 months to life, he contends there was trial and sentencing error.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence*.

On the afternoon of May 20, 2002, there was a robbery at A and J Games, a video game store. Asif Shaikh, who worked at the store, testified defendant Carwell came in and bought a power cord. Videotape from the store's surveillance camera showed that, while Shaikh was ringing up this transaction, Carwell made a hand gesture behind his back. Carwell then sat down at one of the store's video game machines and started playing. Other customers came and went from the store. Suddenly, one of them jumped behind the sales counter, pulled out a gun, and told Shaikh to put the contents of the cash register into a paper bag. Then a second robber jumped behind the counter.

The robbers took Shaikh to a back room which could not be seen from the store's public area. Shaikh showed them where the rest of the store's cash was kept. The robbers tied Shaikh's hands with duct tape and also covered his eyes with duct tape. They took his keys, money and a cell phone. Two young students, including 13-year-old Bryan A., walked into the store while the robbery was in progress. They were also taken into the back, tied with duct tape, and had duct tape put over their eyes. Shaikh later discovered the robbers had taken the video store owner's handgun.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

A police officer testified he identified two of the robbers on the surveillance videotape as 14-year-old Dejuan Jordan and 16-year-old Javon Washington. The videotape shows that Jordan and Washington were the two robbers who initially jumped over the sales counter and confronted Shaikh; Jordan jumped first, then Washington. The videotape also shows that before he pulled his gun on Shaikh, Jordan repeatedly walked over to where Carwell was sitting, stood next to him for a short time and then moved away.

On the afternoon of the following day, May 21, 2002, Jordan and Washington rang the doorbell of Barbara M., who lived on Cherokee Street in Hancock Park. When Barbara peeked through a curtain and asked what they wanted, Jordan and Washington said they wanted to come in because they were selling cookies. Barbara could see their hands were empty. She told them she wasn't interested and they left. She saw them walk across the street and approach the house of her neighbors, Deborah and Ralph.

Ralph testified he answered the front door to find Jordan and Washington standing there. They said they were selling candy. Ralph said he wasn't interested, but they persisted so he asked them to display their wares. Jordan replied, "We will show you what we have," and pushed his way into the house. When Ralph tried to close the door, Jordan pointed a gun at him. Washington entered the house, also carrying a gun.

Jordan saw Deborah on the staircase, pointed the gun at her head, and told her to come down or he would shoot her. Just then Ralph's father, Harry, walked out of the breakfast room. Washington pushed Harry and Ralph into the living room. Jordan grabbed Deborah and took her into the living room. The victims were ordered to throw their valuables onto the floor. Deborah surrendered her watch. Ralph surrendered his wedding band, his watch and his wallet, which contained cash and credit cards. Harry surrendered his wallet. Jordan and Washington used duct tape to bind Ralph and Harry's hands and feet, and to cover their eyes.

Washington and Jordan ordered Deborah to lie on the floor. Jordan straddled her hips, sat down on her buttocks, and tied her hands behind her back with duct tape. He rubbed himself against her and began pulling her pants down. When Deborah resisted,

Jordan asked Washington to help him get her pants and shoes off. Washington grabbed Deborah and pointed his gun at her head. Jordan removed her pants, underwear, socks and shoes. Then Jordan put his gun into Deborah's mouth and told Washington to go first. When Washington complained Deborah's vagina was too dry to penetrate, Jordan told him to use her mouth. Washington forced Deborah to orally copulate him. When he ejaculated, she spit the semen onto the sweatshirt she was wearing.

Jordan tried to put his penis into Deborah's vagina. He complained she was too dry and said he was going to get some "lube." He went upstairs and returned with liquid soap, which he used to coat his penis. While Washington pointed his gun at Deborah's face, Jordan raped her. Jordan and Washington then tied Deborah's ankles and taped her eyes. They left her naked from the waist down.

Deborah testified that after Jordan and Washington came into her house they kept saying "their homies were going to be coming." She also testified that, after raping her, Jordan "asked me to make some comment about was he good or did I need an older man. [¶] [A]nd he asked once and I kept [quiet] because there was no good answer to that, and he asked more urgently a second time and then a third time . . . ." At one point, a cell phone rang and then Deborah saw Washington "looking through the little glass window in the front door looking out. And eventually, I saw him open the door and I heard him say the word 'Javon.' " Two more people walked into the house.

Ralph testified that after the sexual assault ended, he heard one of the robbers talking on the telephone. "Soon thereafter, I heard the sound of the front door opening, and I heard the sound of what seemed to be additional people entering the house." "[T]he new voices . . . seemed to be inquiring of the first two boys what they had already gotten from us. [¶] . . . [¶] I don't remember any particular responses. I do remember . . . the voices of the new intruders being very insistent that they be shown everything. There seemed to be a lack of trust, some measure of suspicion that whatever was taken from us was [? not] being shown to them. [¶] Q. While you were hearing this occurring, this conversation, at any time did you hear anything in the nature of why [Deborah] is naked, what did you guys do, what happened here, anything of that nature? [¶] A. Absolutely

not." "Q. No reference to her being naked from the conversations you heard? [¶] A. None whatsoever."

Ralph was afraid the robbers were upset about not finding anything really valuable, so he offered to show them some jewelry upstairs. When they removed the duct tape from Ralph's eyes, he saw that Jordan and Washington had been joined by two older males who had jackets draped over their heads to hide their faces. Each newcomer was carrying a gun. When the robbers came back downstairs, one of the newcomers forced Deborah's wedding and engagement rings off her fingers. Then the robbers slammed the front door and left. Deborah waited just a few minutes, no more than five, before crawling into the breakfast room and calling 911. This phone call was made at 4:07 p.m.

Although both Deborah and Ralph identified Jordan and Washington as the first pair of robbers to enter their house, neither victim had been able to see the faces of the second pair. DNA recovered from Deborah's vagina matched Jordan's DNA; DNA recovered from her sweatshirt matched Washington's DNA. Jordan's fingerprints were found on duct tape and a bottle of soap in Deborah's house. Washington's fingerprint was found on a shelf in Deborah's bedroom.

Ira Dayrit was the assistant manager of a Ralph's grocery store located on Pico Boulevard. Dayrit testified that on the afternoon of May 21, 2002, he noticed a group of six or seven males in the store. They were huddled together and one of them was passing out money to the others. This same group was shown on the store's surveillance videotape approaching the night manager at the customer service desk at 4:31 p.m. The videotape also showed two members of this group, at 4:50 p.m., trying to use one of the credit cards that had been stolen from Ralph during the home invasion robbery that afternoon.

That same evening, Carwell used one of Ralph's stolen credit cards at a Shell gas station on Pico Boulevard.

On June 12, 2002, police executed a search warrant at Carwell's home. The gun stolen during the A and J Games robbery was found in his bedroom. A role of duct tape was found in a dresser in a hallway.

A police officer testified it took him 20 minutes to drive from the scene of the home invasion robbery in Hancock Park to the Ralph's store on Pico. This 20-minute period did not include time for the officer to get into his car, find a parking spot at Ralph's, or actually walk into the store. The Ralph's manager testified customers parked their cars in a multi-story parking structure and then took an elevator or escalator to the store site. Although Carwell's house was between the victims' house and the Ralph's store, it was not on a direct line. Stopping there would have involved turning off Pico, driving down to Carwell's house, and then doubling back to get onto Pico again.

When they were questioned by police, Washington and Jordan admitted they had been involved in both the A and J Games robbery on May 20, 2002, and the home invasion robbery the next day. They also admitted they were the ones who sexually assaulted Deborah. Police interrogated 21-year-old Tyrus Green, who admitted having participated in the A and J Games robbery. Green also admitted his involvement in the Hancock Park home invasion robbery, but claimed he had been "outside." Green, Jordan and Washington all told police that after committing the home invasion robbery they had gone to a Ralph's grocery store on Pico.

On June 13, 2002, Carwell was interviewed by Detective Long. At the time, Long was unaware of the A and J Games robbery and only questioned Carwell concerning his whereabouts on Tuesday, May 21, 2002, the day of the Hancock Park home invasion robbery. Carwell said he had gone to northern California on May 17 or 18 with a group of people. Most of the group returned to Los Angeles on Sunday, but Carwell and his friend Ike did not return until Wednesday, May 22. When Long showed Carwell a surveillance videotape proving he had been at the Shell gas station on Pico the night of May 21, Carwell admitted he had returned to Los Angeles that day, but he insisted he stayed inside his house until after 6:00 p.m. However, when Long then confronted him with the Ralph's surveillance videotape, Carwell said he had gone there with his friend

Larry to buy baby milk. He said someone named Chris had given him stolen credit cards earlier on May 21 when he was at a basketball court on Crescent Heights. When Carwell and Larry tried to use one of the stolen credit cards at Ralph's, the transaction was blocked.

A police officer testified he drove the length of Crescent Heights Boulevard without finding any basketball courts.

2. *Defense evidence.*

Carwell testified in his own behalf. He admitted having participated in the A and J Games robbery, but he denied having any role whatsoever in the home invasion robbery. He admitted that in 2000 he had been convicted of attempted residential burglary.

On the morning of May 21, 2002, his friend Kellus was visiting him. Tyrus Green came over with two people Carwell had never met before. The five of them went to A and J Games to commit a robbery. They planned to use a gun and duct tape. Carwell's role was to go into the store, size up the situation and determine when the robbery should begin. After buying the power cord, he sat down at one of the video game machines to wait for customers to leave the store. Carwell conceded the surveillance videotape showed Jordan walking over to him three or four times while he was sitting at the video game machine. He denied Jordan was asking when they should start the robbery; rather, Jordan was just chatting with him about the video game. Carwell also denied knowing Jordan was only 14 years' old. However, he admitted knowing Jordan was armed. The plan was to get the store clerk into the back of the store and tie him up with duct tape. Carwell conceded the surveillance tape showed him making "a hand signal" behind his back to warn the others not to come in yet because there were still customers in the store. After the robbery commenced, Carwell walked out of the store, but he returned almost immediately to steal some video games and clean his fingerprints off the game machine. Green also entered the store.

The next afternoon, at about 4:00 p.m., Kellus and Larry were at Carwell's house. Green arrived with Jordan and Washington; they had some credit cards. Carwell knew the cards must be stolen. Larry, who had recently become a father, wanted to use the

cards to get some baby milk, so they all decided to go to Ralph's. Carwell did not see anyone passing out money inside the store. He conceded the surveillance videotape showed "all six of us" at the customer service counter at 4:31 p.m. When Larry's credit card transaction was declined, he and Carwell left the store.

3. *Proceedings*.

At the time of the robberies, Carwell and Green were both 20 years' old, Washington was 16, and Jordan was 14. Washington, Jordan and Green were originally charged as Carwell's codefendants, but on the eve of trial they pled no contest. Only Carwell was tried.

CONTENTIONS

1. The trial court erred by allowing the jury to convict Carwell for Deborah's sexual assault on a natural and probable consequences aiding and abetting theory.

2. The trial court erred by admitting hearsay evidence in violation of Carwell's right to confront witnesses.

3. The trial court erred by imposing an aggravated sex offense sentence under section 667.61.

4. The trial court erred by sentencing Carwell to upper terms in violation of the *Apprendi/Blakely* rule.

DISCUSSION

1. *Natural and probable consequences theory was proper*.

Carwell contends the trial court erred by submitting the sexual assault counts to the jury on an aiding and abetting theory because the attack on Deborah cannot, as a matter of law, be considered a natural and probable consequence of the home invasion robbery. This claim is meritless.

"It is important to bear in mind that an aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and

abetted.' [Citation.] Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) "[A]lthough variations in phrasing are found in decisions addressing the doctrine -- 'probable and natural,' 'natural and reasonable,' and 'reasonably foreseeable' -- the ultimate factual question is one of foreseeability. [Citations.] 'A natural and probable consequence is a foreseeable consequence' [citation]; . . . the concepts are equivalent in both legal and common usage." (*People v. Coffman* (2004) 34 Cal.4th 1, 107.) "The test for an aider and abettor's liability for collateral criminal offenses is neither legally abstract nor personally subjective. It is case specific, that is, it depends upon all of the facts and circumstances surrounding the particular defendant's conduct. Within that context it is objective; it is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted. [Citations.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)

At trial, Carwell moved to dismiss the sex offense counts, arguing the attack on Deborah was unforeseeable because it resulted from the independent acts of Jordan and Washington which were committed before Carwell even entered the house. The prosecutor argued there was evidence demonstrating the attack on Deborah had been foreseeable, in particular the facts that: (1) the perpetrators planned to immobilize the home invasion robbery victims, which would render them particularly vulnerable to this sort of extraneous sexual violence; and (2) Carwell and the fourth robber expressed no surprise at finding Deborah naked from the waist down when they arrived, which raised the inference it was not unexpected to them that she had been assaulted.

In rejecting Carwell's motion to dismiss, the trial court relied on *People v. Nguyen supra*, which explained: "Robbery is a crime that can be committed in widely varying circumstances. It can be committed in a public place, such as on a street or in a market, or it can be committed in a place of isolation, such as in the victim's home. It can be committed in an instant, such as in a forcible purse snatching, or it can be committed over

a prolonged period of time in which the victim is held hostage. During hostage-type robberies in isolated locations, sexual abuse of victims is all too common. As Presiding Justice Gardner observed (with respect to residential robbery) in his concurring opinion in *People v. Lopez* (1981) 116 Cal.App.3d 882, 891 . . . : 'When robbers enter the home, the scene is all too often set for other and more dreadful crimes . . . . In the home, the victims are particularly weak and vulnerable and the robber is correspondingly secure. The result is all too often the infliction of other crimes on the helpless victim. Rapes consummated during the robbery of a bank or supermarket appear to be a rarity, but rapes in the course of a residential robbery occur with depressing frequency.' [¶] With respect to residential robbery and other isolated victim and hostage-type robberies, we agree with Presiding Justice Gardner's observation, both as a reflection of the reported decisional authorities [citations], and as a synopsis of our experience with criminal cases which this court is regularly required to consider. *Robbery victims are sexually assaulted far too often for this court to conclude, as a matter of law, that sexual offenses cannot be a reasonably foreseeable consequence of a robbery*." (*People v. Nguyen supra*, 21 Cal.App.4th 3at pp. 532-533, italics added.)[2]

Carwell now argues that "even if one accepts the general reasoning in *Nguyen* as sound, it does not follow that the evidence in the instant matter was sufficient to allow the natural and probable consequences doctrine to be presented to the jury" because "the circumstances . . . reflect that the attacks were not on the foreseeable agenda, but rather

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[2] Although the defendants in *Nguyen* had robbed two commercial establishments, the particular nature of the businesses made those robberies more akin to residential robberies. The *Nguyen* defendants robbed a tanning salon and a relaxation spa, which the Court of Appeal characterized as "businesses with a sexual aura, both from the types of services they held themselves out as providing and from the strong suspicion, repeatedly expressed by the participants at the trial, that they were actually engaged in prostitution. The businesses were arranged much like a residence, with separate rooms furnished as bedrooms might be. The businesses operated behind locked doors, which both added to their sexual aura and gave the robbers security against intrusion or discovery by outsiders. The robbers went to the businesses in sufficient numbers to easily overcome any potential resistance and to maintain control over the victims for as long as they desired." (*People v. Nguyen, supra,* 21 Cal.App.4th at p. 533.)

were the sudden design of one of the boys, Dejuan Jordan, who found himself positioned on [Deborah's] buttocks as he bound her from behind. He simply took advantage of his opportunity to assault her." But the whole point of a home invasion robbery is to terrorize the victims into surrendering their valuables. And as *Nguyen* explained, that alone creates a situation where the commission of extraneous acts of violence is foreseeable.

In this case, there were other factors which increased the likelihood of that happening. The perpetrators' plan was not only to confront the victims with guns, but to bind and blindfold them. The plan was to have the initial invasion carried out by two young teenagers, who might be expected to be so irresponsible about their immature sexuality that they would be readily inclined to exploit a victim's helplessness. Indeed, Jordan's "opportunistic" decision to assault Deborah instantly degenerated into a horrific rape-in-concert, during which the perpetrators took turns sexually assaulting the victim while threatening her with a gun.

Carwell was older and more sophisticated[3] than Jordan and Washington and, therefore, was in a position to foresee his young accomplices might impulsively exploit their total control over a helpless victim. That Carwell expressed no surprise whatsoever at finding Deborah half naked when he entered the house tended to show he did not, in fact, consider the sexual assault unforeseeable.

In sum, the natural and probable consequences theory was properly submitted to the jury because the evidence showed that "a reasonable person in [Carwell's] position

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3 The evidence tended to show Carwell had directed the A and J Games robbery. While keeping the store clerk occupied, Carwell furtively signaled his accomplices to wait for a better time to start the robbery. Later, as Carwell sat playing a video game, Jordan kept walking over to him, apparently eager to receive the go-ahead to start the robbery. Carwell quickly left the store when Jordan pulled out his gun, but then returned to wipe his fingerprints off the video game equipment. In his own testimony, Carwell even referred to "my plan" while explaining his role in the robbery. During the home invasion robbery, Carwell successfully disguised himself, whereas Jordan and Washington not only failed to disguise themselves, they left fingerprint and DNA evidence behind.

would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted." (*People v. Nguyen, supra,* 21 Cal.App.4th at p. 535.)

2. *Crawford error was harmless*.

Carwell contends his convictions arising out of the home invasion robbery must be reversed because the trial court committed prejudicial error by admitting his accomplices' police statements in violation of his right to confront adverse witnesses. This claim is meritless.

"Under [*Ohio v. Roberts* (1980) 448 U.S. 56 [65 L.Ed.2d 597]], an unavailable witness's hearsay statement could be admitted without violating the Sixth Amendment's confrontation clause if the statement bore adequate indicia of reliability -- if it either fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. [Citation.] However, [in *Crawford v. Washington* (2004) 541 U.S. 36, [158 L.Ed.2d 177]] the high court recently reconsidered its ruling in *Roberts*, concluding that if the hearsay statement offered for its truth was testimonial in nature, its admission would violate the confrontation clause contained in the United States Constitution unless the defendant had had a prior opportunity to cross-examine the now-unavailable declarant. . . . [¶] . . . [¶] [I]f the hearsay statement was 'testimonial' in nature, its admission violates the confrontation clause unless the defendant was afforded an opportunity to confront and cross-examine the hearsay declarant." (*People v. Price* (2004) 120 Cal.App.4th 224, 237-238.) However, *Crawford* error may turn out to be harmless as tested by the *Chapman*[4] standard. (See *People v. Song* (2004) 124 Cal.App.4th 973, 985; *United States v. Rashid* (8th Cir. 2004) 383 F.3d 769, 776.)

As noted above, although Green, Washington and Jordan were originally charged as codefendants, they entered no contest pleas on the eve of trial. After each accomplice subsequently invoked his Fifth Amendment right not to testify, the trial court allowed the

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[4] *Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705].

prosecution to present hearsay evidence of statements the three former codefendants made during police questioning.

We agree with Carwell, this evidence violated *Crawford* because it was testimonial hearsay not subject to cross-examination. However, we do not agree with his further argument that we must therefore reverse his convictions. Carwell asserts the *Crawford*-violative evidence was "highly prejudicial . . . because other than his presence with the co-defendants at the Ralph's grocery store and his possession of one of the stolen credit cards thereafter, there was no direct evidence connecting [him] to the residential robbery." In fact, there was no direct evidence at all connecting Carwell to the home invasion robbery. There was, however, a wealth of circumstantial evidence tending to show his involvement, the key aspects of which were unaffected by the *Crawford* error.

As heard by the jury, the police's questioning of Carwell's accomplices yielded only a few admissions. Jordan and Washington admitted having committed the video store and home invasion robberies, as well as the attack on Deborah. Green admitted his involvement in both robberies. All three accomplices said they went to Ralph's after committing the home invasion robbery.[5]

But except for Green's involvement in the home invasion robbery, all of these facts were established by other evidence, e.g., eyewitness testimony or physical evidence such as fingerprint analysis, DNA testing and surveillance videotapes. So, while Carwell is correct to assert the *Crawford*-violative material "was the only evidence which placed [Green] at the scene of the home invasion robbery," we cannot agree with his further assertion that "[w]ithout the admission of Green's statement, the jury may well have

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5 It is important to note, however, that it was unclear if the accomplices were claiming they drove straight from the home invasion robbery to Ralph's. The testimony was as follows: "Q. Detective, with regards to your interview with Jordan, Washington and Green, did you ask each of them whether or not after the home invasion robbery they went to a Ralph's on Pico? [¶] A. Yes. [¶] Q. Did they each acknowledge that they did? [¶] A. Yes." During closing argument, the prosecutor never referred to this evidence, arguing only that there had simply not been enough time to stop at Carwell's house on the way to the Ralph's store.

concluded that the evidence was insufficient to place appellant at the residence on the day of the robbery there." We disagree because neither of the two key prosecution theories, the drive time theory and the incredible alibi theory, are weakened if evidence that Green participated in the home invasion robbery is lost.

It is undisputed that Carwell appeared at Ralph's, accompanied by Green, Jordan and Washington, a mere half hour after the home invasion robbery ended, and that Jordan and Washington were two of the home invasion robbery perpetrators. There was extremely strong evidence that, given the distances involved, Jordan and Washington must have driven straight to the grocery store after leaving the robbery scene. There was only about a 30-minute window between the time the perpetrators left Hancock Park, very close to 4:00 p.m., and when they showed up on the Ralph's surveillance videotape at 4:31 p.m. Detective Castillo testified it took him 20 minutes to drive from the victims' house to the grocery store, which did not include getting into his car when he started out, or parking at the Ralph's parking structure and actually walking into the store. Castillo did this test at 11:00 a.m. on a weekday. Carwell's house does not lie directly between Hancock Park and Ralph's, and stopping off there would have involved a slight detour. Carwell testified the group chatted for five minutes in front of his house before deciding to go to Ralph's.

On the basis of all this evidence, the prosecutor told the jury: "Do the math, ladies and gentlemen. . . . [¶] Is it possible for these people who committed the residential robbery, as they're driving from [the victims'] house, to Ralph's, to drive down and go further south, stop off at the defendant's house, hang out for five minutes, jump in the car, go back up north and get to Ralph's? [¶] Physically impossible. Could not have happened the way he tells it. Could not have possibly happened. [¶] The only way the people could have gotten to the Ralph's and be seen at 4:31 in heavy traffic in L.A. at four o'clock is if they went directly from the house, directly to Ralph's. No other thing can make sense."

A second prosecution theory concerned Carwell's incredible alibi, which dutifully morphed whenever he was confronted with new inculpatory evidence. When he was

questioned by the police just three weeks after the robberies, Carwell first said he had been out of town on May 21, 2002, the date of the home invasion robbery. He offered a very detailed story about traveling to northern California with a group of friends and returning with one particular friend on May 22. This detailed alibi was immediately altered when Carwell was shown the surveillance tape proving he had been at the Shell station on Pico on the night of May 21. Now Carwell remembered he did return to Los Angeles on May 21, but he insisted he did not leave his house until after 6:00 p.m. that evening. Confronted next with the Ralph's surveillance tape, Carwell now recalled going to Ralph's with his friend Larry before 6:00 p.m. *and* having been given stolen credit cards earlier that day at a basketball court on Crescent Heights by a guy named Chris. But then at trial, after a police officer testified he couldn't find a basketball court on Crescent Heights, Carwell came up with a whole new story, explaining that he had been home when Green, Jordan and Washington brought over the stolen credit cards, and that they had then all gone on to Ralph's. These ever-changing alibis completely destroyed Carwell's credibility.

Carwell claims to have spotted fundamental flaws in the prosecution case. He argues: "[T]he robbers could have left as early as 4:00 or two minutes past. Respondent does not cite any authority reflecting that appellant was seen on videotape entering the Ralph's store at 4:31 p.m., but even if that was true, this time was as much as 29 minutes after the perpetrators left the Hancock Park home, plenty of time for the suspects to drive to appellant's home and then to the Ralph's grocery store. [¶] Moreover, respondent cannot explain the presence of two or three more other males at the Ralph's grocery store. The store manager . . . testified that there were six or seven males in the group that entered his store."

Carwell has not spotted any flaws. During closing argument, both the prosecutor and defense counsel consistently referred to 4:31 p.m. as the time Carwell was first seen on the Ralph's videotape. They did so because that is the time recorded on the videotape by the surveillance equipment's internal clock. Whether 30 minutes left the perpetrators enough time to stop at Carwell's house on their way to Ralph's was a question of fact for

the jury which, given the evidence, could have reasonably concluded there was insufficient time. Whether or not Green participated in the home invasion robbery, Jordan and Washington still had only 30 minutes to get from Hancock Park to Ralph's.

The presence of "extra" males at Ralph's was not inexplicable. Just because only two more perpetrators joined Jordan and Washington in the home invasion robbery does not mean there weren't more "homies" present who stayed outside. Carwell testified that, on the day before, his friend Kellus had gone with the group to the A and J Games robbery, and one of the video store victims testified he saw four to six robbers. There could easily have been more than four persons present, either as participants or observers just along for the ride, at either robbery.

In sum, although the only direct evidence Green had been involved in the home invasion robbery was his improperly admitted police statement, there was a wealth of circumstantial evidence tending to show he and Carwell were the two "newcomers" who joined Jordan and Washington.

An additional item of circumstantial evidence inculpating solely Carwell was Deborah's testimony that Washington greeted the appearance of the second pair of robbers by saying, "Javon." Because "Javon" is Washington's own first name, Deborah's testimony makes no sense. But the name "Javon" sounds very much like "Jalon," which is Carwell's first name. Carwell remarked on the similarity during his own testimony.[6] A reasonable inference is that Deborah simply misheard Washington when he greeted Carwell at her front door.

We conclude the *Crawford* error involving Green's admission of his involvement in the home invasion robbery was harmless beyond a reasonable doubt.

3. *One Strike sentence properly imposed*.

Carwell contends the trial court erred by imposing aggravated sentences pursuant to section 667.61, the so-called One Strike law, because his accomplice liability was based on the natural and probable consequences doctrine. This claim is meritless.

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6 Carwell testified the name Javon "is easy to remember because it's close to mine."

Section 667.61 provides that a defendant convicted of an enumerated sex offense under specified circumstances "shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years." (§ 667.61, subd. (a).)

Carwell argues this statute cannot apply to natural and probable consequence aiders and abettors because "[i]n *People v. Walker* (1976) 18 Cal.3d 232, the California Supreme Court set forth certain parameters of derivative liability for an enhanced sentencing statute. The court held that, generally, if the Legislature intended to impose derivative liability on a person other than the actual perpetrator, the statute must contain some legislative direction that it is to be applied to such persons." But *Walker* is inapposite because that case concerned the application of an enhancement statute (§ 12022.5 -- use of a firearm) within the context of the determinate sentencing scheme.

Section 667.61 is not a true enhancement statute; rather, it is an alternative sentencing scheme that is separate from the determinate sentencing system. "[T]the distinction between sentencing schemes and enhancements is well established." (*People v. McPherson* (2001) 86 Cal.App.4th 527; 532 ["McPherson's reliance on [*Walker*] is misguided. *Walker* states that certain enhancements may not be based on derivative liability, but section 667.6, subdivision (d) is a sentencing scheme, not an enhancement statute."]; *People v. Farr* (1997) 54 Cal.App.4th 835, 843 ["the present case involves the application of a separate sentencing scheme [section 667.6] -- not the interpretation of an enhancement as was the case in *Walker*"].)

Moreover, *Walker* "held a defendant must personally use a firearm in the commission of a felony in order to be subjected to the enhanced penalty provided by section 12022.5, even though the statute at that time contained no such express limitation." (*People v. Manners* (1986) 180 Cal.App.3d 826, 830.)

Here, on the other hand, some parts of section 667.61 require personal participation and some do not. The triggering circumstance at issue here, subdivision (e)(6), applies to a defendant who "engaged in the tying or binding of the victim or another person in the commission of the present offense."

Carwell argued this factor did not apply to him because he was not present when Jordan and Washington tied up Deborah. However, as the trial court pointed out, unlike subdivision (e)(4) of section 667.61, which only applies if a defendant "personally used" a weapon, subdivision (e)(6) does not say *personally* engaged in tying and binding. As the trial court reasoned: "We have to presume the Legislature chooses words carefully. That would leave open an aiding and abetting theory on the tying and binding. And it certainly would be the case here where the day before victims of the video robbery were bound by duct tape, that there would be an expectation that victims in this case would be bound by duct tape."

There was no error in imposing sentence under section 667.61.

4. *Imposition of aggravated terms was proper*.

Carwell contends the imposition of aggravated terms on counts 1, 5, 6, 7 and 8[7] was improper because, under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], and *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403], the jury, not the trial court, should have made the predicate factual determinations. The rule of these two cases is that, *other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt.

"[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2537.)

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[7] The sentences on counts 5 through 8 were made concurrent to the sentence on count 1.

Carwell contends the trial court improperly imposed aggravated terms in violation of the *Apprendi/Blakely* rule because it cited such factors as particularly vulnerable victims, evidence of planning, and Carwell's supervisory role.

But the trial court also relied on the fact Carwell had been on probation when he committed the current offenses. This is an aggravating factor which may be determined by the trial court without violating the *Apprendi/Blakely* rule because it is so intimately tied to the fact of a prior conviction. (See *People v. White* (2004) 124 Cal.App.4th 1417, 22 Cal.Rptr.3d 586, 605; *People v. Vu* (2004) 124 Cal.App.4th 1060, 1060.) Moreover, the trial court expressly said there were no mitigating factors in this case. "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492.)

We conclude it is not reasonably probable the trial court here would have chosen lesser sentences had it been able to rely only on the fact Carwell was on probation in order to justify aggravated terms.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.